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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



D2

[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: MAR 02 2011
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is a healthcare staffing firm. To employ the beneficiary in a position it designates as a physical therapist position, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The appeal is filed to contest each of the independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish that the petitioner will employ the beneficiary in a specialty occupation position and that the Labor Condition Application (LCA) in this case corresponds to the visa petition in that it is valid for the location or locations where the beneficiary would work. The director also found that the petitioner had failed to provide an itinerary of the locations where the beneficiary would work during the period of intended employment.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's requests for additional evidence (RFEs); (3) the responses to the RFEs; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor's *Occupational Outlook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT*

Independence Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (hereinafter referred to as *Defensor*). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work’s content.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

The visa petition states that the beneficiary would work at [REDACTED]. The [REDACTED] submitted to support the visa petition states that the beneficiary would work in [REDACTED], Delaware.

With the petition counsel provided a letter, dated March 16, 2009, from the petitioner’s Vice President of Human Resources. The vice president stated that the petitioner “provides travel, local contract and local per diem, temp-to-perm and permanent placement services across the country.” That letter did not address the relationship between the petitioner and [REDACTED] or demonstrate that a vacant physical therapist position exists at that facility which position [REDACTED] has agreed the beneficiary may fill.

Counsel also provided a letter, dated March 16, 2009, in which the petitioner extended an offer of employment to the beneficiary. Although that letter states the duties and compensation of the position, it does not state where the beneficiary would work.

On May 28, 2009 the service center issued a request for evidence in this matter. The service center requested, *inter alia*, that the petitioner identify the business at the [REDACTED] facility at which the beneficiary would work. The service center also requested a letter from that business addressing the title and duties of the beneficiary's proposed position, the minimum educational requirement for that position, and the name and position of the person who would supervise the beneficiary's performance of her duties.

In response, counsel provided an undated contract between the petitioner and [REDACTED] of [REDACTED]. That agreement indicates that the petitioner is in the business of placing healthcare professionals in healthcare facilities pursuant to various terms designated as full-time, per diem, registry, permanent, and travel contract. That contract describes the terms pursuant to which the petitioner would provide healthcare professionals to Rehab. It does not specify where those healthcare professionals would work. It does not state that the beneficiary would work for Rehab.

In a letter dated June 24, 2009 counsel stated that the petitioner anticipates that the beneficiary would work for [REDACTED]. Counsel did not, however, indicate whether the beneficiary would work in [REDACTED], or whether [REDACTED] owns or operates a healthcare facility there, or whether it provides healthcare professionals to a facility there.

Further, counsel did not provide the specifically requested letter from the [REDACTED] business where the beneficiary would allegedly work, addressing the title and duties of the beneficiary's position, the minimum educational requirement for that position, and the name and position of the person who would supervise the beneficiary's performance of her duties.

The director denied the visa petition on July 14, 2009, based on the grounds noted above.

On appeal, counsel provided an undated document, headed EXHIBIT A-1, on the petitioner's letterhead. That document does not indicate to whom it was addressed, but the document states:

This serves as confirmation of our agreement that [the beneficiary] will work with your facility [REDACTED]. That our bill rate would be \$55.00 per hour. [sic] The Corporate Services Agreement between [REDACTED] and [the petitioner] should cover all other arrangements.

The AAO notes that the record does not contain any agreement ratified by [REDACTED] nor any other document from [REDACTED]. As such, the record contains no description from [REDACTED] Care of the duties it would assign the beneficiary to, or the minimum education it would require in order to fill that position. Further, the record does not contain any indication that [REDACTED] Care has agreed that the beneficiary may work at its facility. Further still, the record

contains no reconciliation of the information in that document with counsel's assertion that the beneficiary would work at Rehab.

The undated document also states:

Right to Hire: Client may hire the [beneficiary] on a permanent full[-]time basis at no additional charge following the completion of a twenty-six (26) week or the confirmed travel assignment or extension (whichever is greater). If the Therapist has been confirmed by Client for an assignment or extension greater than twenty six (26) weeks, Client agrees to honor the original assignment end date prior to hiring the Therapist on permanent full[-]time basis.

That undated document states, yet further:

If above Therapist does not want to come on staff after completion of his/her assignment, Client can give us one month written notice to replace him/her with someone else or not renew his/her assignment.

Although the visa petition states that the petitioner intends to employ the beneficiary from October 1, 2009 through September 15, 2012, that passage makes plain that the petitioner may not, in fact, intend to employ the beneficiary for that period of time. The significance of the petitioner's intent in this matter is addressed below.

Evidence in the instant case shows that the petitioner does not intend to assign the beneficiary to specific duties. Rather, it intends, initially, to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary's services.

Because the petitioner will not, itself, be assigning the beneficiary's duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of that client of the petitioner who will be the end user of the beneficiary's services. Further, the petitioner is obliged to provide one or more such descriptions from one or more clients as necessary to cover the entire requested period of employment.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

Thus, without one or more such job descriptions, the petitioner has not demonstrated that the beneficiary will perform work at the remote job site or sites in a specialty occupation. Further, the

record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied. That basis has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the [REDACTED] provided to support the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition ". . . [USCIS] determines whether the petition is supported by an [REDACTED] which corresponds with the petition . . ." In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage, which must be used in calculating the minimum wage or salary that the petitioner must pay.

The [REDACTED] submitted to support the instant visa petition indicates that the beneficiary would work in [REDACTED] Delaware. The record, however, contains no evidence to corroborate the petitioner's assertion that it has secured a position for the beneficiary to fill in [REDACTED]. Further, counsel provided evidence pertinent to Rehab and stated that the beneficiary would work for Rehab at a location counsel did not disclose.

The petitioner has not demonstrated that the beneficiary would work in [REDACTED] and has not, therefore, demonstrated that the [REDACTED] provided corresponds with the instant visa petition as required by 20 C.F.R. § 655.705(b) and that it is valid for the location where the beneficiary would work. The appeal will be dismissed and the visa petition denied on this additional basis.¹

¹ Also, as indicated in this decision's earlier discussion of conflicting evidence as to where the beneficiary would actually work, the [REDACTED] does not cover all of the locations indicated for the beneficiary's employment.

Yet further, the petitioner is obliged to demonstrate that it will employ the beneficiary throughout the requested period of employment. However, the unaddressed, undated document provided on appeal, if taken as a valid statement of the petitioner's intent, suggests that the petitioner does not intend that the beneficiary should work at the [REDACTED] in [REDACTED] Delaware throughout that entire period, unless [REDACTED] agrees to employ her herself. The petitioner is obliged by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary of the beneficiary's proposed employment, and has accounted for only 26 months of employment out of the almost three-year period of requested employment. Even if the bases for denial described above were overcome, the AAO would be unable to approve the visa petition for any period longer than the 26 weeks during which the beneficiary would ostensibly work at [REDACTED]. Further, that undated document does not indicate when the asserted employment at [REDACTED] would begin and end.

The record suggests additional issues that were not addressed in the decision of denial.

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

Counsel has asserted several times, including in the appeal brief, that the petitioner is the beneficiary's prospective employer, rather than an agent. What remains in dispute is whether

counsel is correct that the petitioner qualifies as the beneficiary's prospective U.S. employer and whether the petitioner has, therefore, standing to file the instant visa petition.

The petitioner is located in Indianapolis, Indiana. The petitioner proposes that the beneficiary should work, for, approximately, the first 26 weeks of the period of requested employment, in Delaware, almost 700 miles distant. Where the beneficiary might work after that is unclear. The distance between the petitioner and the beneficiary's work location or locations raises the issue of whether the petitioner would assign the beneficiary's duties to her and supervise her performance of them. When the service center requested that the petitioner provide a letter from the end user of the beneficiary's services that would stipulate, *inter alia*, who would supervise the beneficiary's performance of her duties, the petitioner did not provide that evidence. The petitioner has not demonstrated that it would assign the beneficiary's duties to her and would supervise her performance of them. The undated document also suggests that [REDACTED] would have the option of ending the beneficiary's employment at its location, which is tantamount to the ability to terminate employment. The petitioner has not, therefore, demonstrated that it would be the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii), as the evidence in the record of proceeding does not establish that the petitioner would actually have and exercise the right to control the beneficiary's work. The petitioner has not demonstrated, therefore, that it has standing to file the instant visa petition pursuant to 8 C.F.R. § 214.2(h)(2)(i)(A). The appeal will be dismissed and the petition denied on this additional basis.

The petitioner's failure to provide that requested evidence, which evidence was relevant to the material issue of whether the petitioner would, itself, be the beneficiary's employer, also renders the petition deniable pursuant to 8 C.F.R. § 103.2(b)(14). The appeal will be dismissed and the petition denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.